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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HERBERT GREEN, ET AL., Plaintiffs. v. SOUTHERN CALIFORNIA EDISON COMPANY, ET AL., Defendants. SOUTHDOWN, INC., Defendant, Cross-Complainant and Appellant, v. NU WEST FABRICATION & RUBBER SUPPLY COMPANY, Cross-Defendant and Respondent.	B144869 (Super. Ct. No. KC 030309)

Appeal from a judgment of the Superior Court of Los Angeles County. William J. McVittie, Judge. Reversed and remanded with directions.

Samaha • Grogin, LLP and Thomas J. Samaha; Haight, Brown & Bonesteel, LLP, Roy G. Weatherup and J. Alan Warfield for Defendant, Cross-Complainant and Appellant.

Greines, Martin, Stein & Richland, LLP, Irving H. Greines and Peter O. Israel; Cummings & Kemp and Bruce E. Todd for Cross-Defendant and Respondent.

Southdown, Inc., dba Transit Mixed Concrete (Southdown) hired a number of contractors to perform work on Southdown's cement plant. Herbert Green, an employee of a subcontractor (plaintiff), was injured on the property, and sued Southdown and others. Southdown then cross-complained against various entities, including Nu West Fabrication & Rubber Supply Company (Nu West), alleging that they were bound to defend and indemnify Southdown in connection with plaintiff's lawsuit.

Nu West moved for summary adjudication on Southdown's express indemnity cause of action, and also moved for a determination that it had entered into a good faith settlement with plaintiff, for the purpose of establishing that it had no liability under Southdown's causes of action for equitable and implied indemnity. Both Nu West's motions were granted, and a final, appealable judgment was entered as between Nu West and Southdown. Southdown appeals, contending that Nu West did not meet its burden as to the motion for summary adjudication. We agree, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND[1]

[1] We recite facts taken from the Reporter's and Clerk's Transcripts, and from the motion to augment the record on appeal.

After being sued by plaintiff, Southdown cross-complained against Machineryland, Inc., Southern California Edison Company, and Roes 1 through 100 (collectively cross-defendants) for implied indemnity, equitable indemnity, declaratory relief (a declaration that cross-defendants were required to pay the total amount of any verdict in favor of plaintiff), and express indemnity. Soon after the cross-complaint was filed, Southdown served Nu West as "Roe 1" in the cross-complaint.

Southdown's cause of action for express indemnity specifically referred to and incorporated by reference a written agreement dated "5-14-97" (the May 1997 Agreement). This cause of action stated that "[o]n or about May 14, 1997 and June 3, 1998, Southdown . . . and Cross-Defendant Machineryland, Inc., and ROES 1-100, inclusive, entered into an agreement whereby Cross-Defendant agreed to provide services to Southdown . . . to defend, indemnify and hold harmless . . . and to name [Southdown] as an additional insured on Cross-Defendant's insurance policy and [Southdown] agreed to pay Cross-Defendant for said services."

The May 1997 Agreement stated that it was between *Machineryland, Inc.* and Southdown, and stated that its terms applied to any claims made by any third party on account of personal injury or death or property damage "caused by, arising out of, or in any way incidental to, or in connection with the performance or nonperformance of the work hereunder, . . ." There was no description of what "the work hereunder" might mean. The May 1997 Agreement was signed by "James R. [illegible]" for "Contractor"

("Contractor" having been earlier defined in the May 1997 Agreement as Machineryland, Inc.) and by Dale Martinez on behalf of Southdown.

Soon thereafter, Nu West filed and served a motion for summary adjudication against Southdown, which motion was supported by declarations from Nu West's attorney, Bruce Todd, and its vice-president, Terry Riches. According to this motion, Southdown had sent Nu West a letter dated June 14, 2000, accompanied by a written agreement dated August 13, 1996 (the August 1996 Agreement). The June 14, 2000 letter asserted that, at Southdown's behest, Nu West had signed the August 1996 Agreement, thereby promising to defend and indemnify Southdown in general, *and, in particular, as to the instant litigation*. In other words, Southdown asserted that the August 1996 Agreement had been signed by Nu West and was intended to apply to the work done by Nu West for Southdown in 1998. The August 1996 Agreement referred to Nu West as the "Contractor," was signed by Dale Martinez on behalf of Southdown, and was signed "Nu-West Fabrication" on the line for "Contractor's" signature.

Terry Riches's declaration stated that Riches was Cross-defendant's vice-president. Riches declared that (1) in 1998, Southdown hired Nu West to dismantle and remove various conveyors at Southdown's cement plant; (2) there had been no discussions before 1998 about such work; (3) Nu West "did not enter into a written contract with [Southdown] regarding the work which was performed by [Nu West] at the aforementioned job site"; (4) Nu West "did not sign any written Express Indemnity Agreement related to the work which [Nu West] performed at the aforementioned job

site"; (5) Nu West's work at that site began on September 9, 1998 and was completed by the end of September 1998; and (6) the business arrangement between Southdown and Nu West regarding such work "was handled by purchase orders/invoices rather than by any written contract."[2]

Nu West's accompanying separate statement of undisputed facts asserted, as undisputed, that (1) the purported written indemnity agreement between the parties was the August 1996 Agreement; (2) Nu West was not hired by Southdown to work at this particular job site until 1998; (3) there was no written contract between the parties regarding the work at this job site in 1998; (4) there was no written express indemnity agreement between the parties regarding the work at this job site in 1998; and (5) Nu West started and finished its work on the project in September 1998.

Southdown objected to the entire Riches declaration on the grounds that it lacked foundation and was not properly authenticated, and that there was no indication that Riches had any personal knowledge of anything that might have happened in 1996 to 1998, since Riches' declaration did not state that Riches was then employed by Nu West or that Riches was the person most qualified to testify on the company's behalf. The trial court sustained this objection, and correctly so.

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[2] This declaration stated that Riches so declared under penalty of perjury and that Riches would so testify if called as a witness. However, this declaration did not comply with the requirements of Code of Civil Procedure section 2015.5 that it either show the date *and place of execution in California* or, if executed elsewhere, that it specify that it was certified under penalty of perjury of the laws of the State of California.

As to the undisputed facts, Southdown agreed with Nu West that (1) the purported written indemnity agreement between the parties was the August 1996 Agreement; (2) Nu West was not hired by Southdown to work at this particular job site until 1998; and (5) Nu West started and finished its work on the project in September 1998. However, as to Fact No. (3), Southdown disputed that there was no written contract between the parties regarding the work at this job site in 1998, and asserted instead that the August 1996 Agreement and the previously-identified purchase orders constituted a written contract. As to Fact No. (4), Southdown asserted that there was a triable issue of material fact whether the August 1996 Agreement constituted the written express indemnity agreement between the parties as to the work at this job site in 1998. The evidence in support of this last assertion was the declaration of Dale Martinez, one of Southdown's administrators. According to Martinez, one of his responsibilities was to make sure that any vendor that did business with Southdown had signed a defense and indemnity agreement, which he then kept on file.

Also according to Martinez, it was Southdown's intention that such agreements would be maintained in perpetuity and would pertain to any work contracted out to each vendor in the future. These indemnity agreements are kept in a file for each vendor, and "applied to and incorporated into every agreement, work order, purchase order or otherwise, for that particular vendor." In particular, when Southdown entered into "the agreement in 1998 with [Nu West] concerning [the job site in question], it was the

intention of [Southdown] that the [August 1996] defense and indemnity agreement signed by MACHINERYLAND [sic?] was part of that agreement."

The trial court granted Nu West's motion for summary adjudication as to the express indemnity cause of action, and, by finding Nu West's settlement with plaintiff was in good faith, did away with Southdown's causes of action for equitable and implied indemnity and declaratory relief.[3] Southdown appeals.

CONTENTIONS ON APPEAL

Southdown contends that the trial court erred by entering judgment for Nu West, because (1) Nu West failed to carry its burden as the moving party on the motion for summary adjudication, and (2) there was a triable issue of material fact as to whether Nu West and Southdown had an express agreement for indemnity and defense that applied to problems arising out of work down by Nu West in 1998. Nu West disputes these contentions.

DISCUSSION

1. *The Motion for Summary Adjudication*

Nu West, as the moving party, had the burden of establishing either that there was a complete defense to the cause of action for express indemnity, or that Southdown could not prove one element of that cause of action. Once a defendant or cross-defendant moving for summary judgment has met the threshold requirement of proving that one or more elements of a cause of action cannot be established, or that there is a complete

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[3] Albeit belatedly, a judgment in favor of Nu West and against Southdown was entered, and we treat the appeal as being from that final judgment.

defense to a cause of action, the burden shifts to the plaintiff or cross-complainant to show that there is a triable issue of one or more material facts. (Code Civ. Proc., § 437c, subd. (c), (o)(2); *PMC, Inc.* v. *Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590.)

Here, Nu West's motion was premised on the theory that Nu West could prove, as a matter of law, that Southdown could not show that there was any agreement for express indemnity between the parties that applied to the work done by Nu West for Southdown in 1998. Nu West did not carry this burden. To do so, it had to show that the August 1996 Agreement, signed "Nu West Fabrication" was not an operative document vis-à-vis these parties and/or vis-à-vis the work done by Nu West in 1998. It failed to do so.

In its moving papers, Nu West did not assert that the August 1996 Agreement was not signed by its officers or agents, nor did it contend that the August 1996 Agreement was never intended by it to apply to any work it might do for Southdown in the future. Instead, it simply asserted that there was no written contract between the parties regarding the work at this job site in 1998 and that there was no written express indemnity agreement between the parties regarding the work at this job site in 1998. In the context of this case, these were merely unsupported conclusions. Moreover, as part of its motion for summary adjudication, Nu West itself already had presented evidence, in the form of the June 14, 1999 letter from Southdown to Nu West seeking a defense and indemnity, that Southdown interpreted the August 1996 Agreement as having been signed on behalf of by Nu West, and as applying to the work done by Nu West for

Southdown in 1998. In other words, the evidence presented by Nu West's own motion for summary adjudication presented an inherent triable issue of material fact: had the parties mutually intended the August 1996 Agreement to apply to Nu West's work in 1998 for Southdown?

To negate this triable issue of material fact, Nu West's moving papers needed to contain evidence establishing that either Nu West never entered into the August 1996 Agreement at all (e.g., that the August 1996 Agreement was never signed on behalf of Nu West), or that the parties never intended such 1996 Agreement to apply to work done by Nu West in 1998. Nu West did not produce evidence as to either issue.[4]

2. *The Motion for Determination of Good Faith Settlement*

Southdown does not contend that the trial court erred by finding that Nu West's settlement with the plaintiff was in good faith. Accordingly, our disposition is addressed only to the issue of Southdown's cause of action for express indemnity.

DISPOSITION

The judgment is reversed as to Southdown's cause of action for express indemnity, and is remanded with directions to the trial court to conduct further proceedings consistent with the views expressed herein. Southdown shall recover its costs on appeal.

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4 Nu West did comment, in briefing, that the handwriting of whoever signed "Nu West Fabrications" to the August 1996 document looked like the handwriting of Dale Martinez. Such speculation was, and is, irrelevant.

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CROSKEY, J.

We concur:

KLEIN, P. J.

KITCHING, J.